ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 10-0268

JOHN E. LEWTON,

Petitioner,

v.

MONTANA TWELFTH JUDICIAL DISTRICT COURT, COUNTY OF CHOUTEAU, THE HONORABLE DAVID G. RICE, District Court Judge,

Respondent.

STATE'S RESPONSE TO APPLICATION FOR WRIT OF SUPERVISORY CONTROL

The State respectfully submits the following response to the Application for Writ of Supervisory Control filed June 7, 2010, by John E. Lewton (Lewton).

STATEMENT OF THE ISSUE

Is the district court's denial of the Petitioner's motion to dismiss an appropriate basis for supervisory control?

PROCEDURAL BACKGROUND

An affidavit in support of a motion for leave to file an Information was filed in Chouteau County on August 24, 2009. (Ex. A, attached hereto.) The Information charges Lewton with two counts of Hunting Without Landowner Permission, felony Unlawful Possession of a Game Animal, and Outfitting

Without a License, and was filed August 27, 2009. (Ex. B, attached hereto.)

On April 14, 2010, Lewton filed a Motion to Dismiss Prosecution With Prejudice, claiming that the Chouteau County case should be dismissed because of a prosecution of Lewton in Jefferson County. The motion was denied on June 3, 2010. (Ex. C, attached hereto.)

The Petitioner now seeks the extraordinary writ of supervisory control, claiming that he is entitled to relief prior to trial.

ARGUMENT

A WRIT OF SUPERVISORY CONTROL IS NOT APPROPRIATE IN THIS CASE.

Supervisory control is an "extraordinary remedy" that is to be exercised only in "extraordinary circumstances." Miller v. Eighteenth Judicial Dist. Ct., 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121 (citing Evans v. Montana Eleventh Jud. Dist. Ct., 2000 MT 38, ¶ 15, 298 Mont. 279, 995 P.2d 455; Park v. Sixth Judicial Dist. Ct., 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d 1267). Consequently, this Court exercises supervisory control only when a district court is proceeding under a mistake of law and, in so doing, is causing a gross injustice, and where the normal appeal process is not an adequate remedy. Miller, ¶ 16. Moreover, this Court makes its determination regarding the exercise of supervisory control on a case-by-case basis. Miller, ¶ 16 (citing Inter-Fluve v. Eighteenth Judicial Dist. Ct., 2005 MT 103, ¶ 17, 327 Mont. 14, 112 P.3d 258).

As this Court recognized in State ex rel. Mazurek v. District Ct. of the Mont. Fourth Judicial Dist., 277 Mont. 349, 352-53, 922 P.2d 474, 476-77 (1996), supervisory control is an extraordinary measure to be exercised only in extreme situations or in the presence of gross injustice and in the absence of other adequate relief. This Court should be "careful not to substitute the power of supervisory control for an appeal provided by statute." State ex rel. Fitzgerald v. District Ct., 217 Mont. 106, 114, 703 P.2d 148, 154 (1985), citing State ex rel. Reid v. District Ct., 126 Mont. 489, 255 P.2d 693 (1952). See also State v. Wolfe, 250 Mont. 400, 821 P.2d 339, 342 (1991) (review of speedy trial claim not proper for writ process); State ex rel. Forsyth v. District Ct., 216 Mont. 480, 484, 701 P.2d 1346, 1348-49 (1985).

A. There Exists No Emergency or Situation Requiring Supervision of the Trial Court. Appeal After Ruling by the District Court Is an Adequate Remedy.

In Montana, review of criminal cases shall be by appeal, to be taken "only from a final judgment of conviction and orders after judgment." Mont. Code Ann. §§ 46-20-101 and -104(1). However, the Montana Constitution gives this Court "original jurisdiction to issue, hear and determine writs" and "general supervisory control over all other courts" in the state. Mont. Const. art. VII, § 2. Pursuant to Mont. R. App. P. 14, the institution of original proceedings may be justified if "urgency or emergency factors exist making litigation in the trial courts and the

normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance."

There is no reason or need for this Court to assert supervisory control in this case. Should the district court rule contrary to the Petitioner's claims, the remedy of appeal would be wholly adequate; he should not be allowed to use the supervisory control process in lieu of the appeal process. Where there is an adequate remedy of appeal and no mistake of law or willful disregard of the law resulting in a gross injustice, such a writ should not be granted. Plumb v. Fourth Judicial Dist. Ct., 279 Mont. 363, 368-69, 927 P.2d 1011, 1014-15 (1996).

Lewton has not and cannot establish a basis for relief from this Court recognized by Mont. R. App. P. 14. There is no mistake of law, no gross injustice, no constitutional issue of statewide importance, and no legal issue regarding substitution of a judge. Mont. R. App. P. 14.

B. There Exists No Mistake of Law or Gross Injustice. The Factual Issues Presented Should be Decided by the Fact-finder at Trial.

While Lewton asserts that the district court erroneously decided his motion to dismiss, he identifies no mistake of law or gross injustice resulting therefrom. He merely restates his argument to the district court, claiming that the charges in Chouteau County should be dismissed.

The Chouteau County district court properly denied the motion to dismiss. It applied the proper authority to the facts of the case (Ex. C at 3-5) and correctly concluded that the motion should be denied. (Ex. C at 5-7.)

As in the Chouteau County district court, the premise of Lewton's argument is that the State could have and should have charged him in one county for all of his illegal acts. His argument ignores the facts of the cases. The allegations stated in the charging documents in Chouteau County are not the same as those stated in the charging documents in Jefferson County. See Exs. A, B, and D, attached hereto. There are no allegations in the charges of common scheme or a continuous course of conduct. The elements of the sale charge in Jefferson County occurred in Jefferson County and must, therefore, be filed in Jefferson County. Mont. Code Ann. §§ 46-3-110, -112. While the facts of the hunt and killing of the animal in Chouteau County were stated in the Jefferson County charges to establish the Defendant's knowledge of the unlawful hunting and killing of the animal, they did not constitute elements of the crime of sale of an unlawfully-killed game animal. The offense could not have been filed in Chouteau County, as none of the elements of the purchase occurred in Chouteau County.

By contrast, the charges in Chouteau County are based on acts committed in Chouteau County. There is no reference to Lewton's subsequent purchase of the

animal in Jefferson County and no element of the crimes charged in Chouteau County was committed in Jefferson County.

Finally, the Blaine County trespass charge was filed where the property lies, with no elements committed in Chouteau or Jefferson County.

This Court requires that three factors must be fulfilled to disallow a subsequent prosecution pursuant to Mont. Code Ann. § 46-11-504(1): (1) a defendant's conduct must constitute an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued; (2) the first prosecution must have resulted in an acquittal or a conviction; and (3) the subsequent prosecution must be based on an offense arising out of the same transaction, as that term is defined in Mont. Code Ann. § 46-1-202(23). State v. Neufeld, 2009 MT 235, ¶ 11, 351 Mont. 389, 212 P.3d 1063, citing State v. Cech, 2007 MT 184, ¶ 13, 338 Mont. 330, 167 P.3d 389; State v. Gazda, 2003 MT 350, ¶ 12, 318 Mont. 516, 82 P.3d 20; State v. Tadewaldt, 277 Mont. 261, 265, 922 P.2d 463, 464 (1996).

While the charges in Jefferson County resulted in an acquittal, the first and third requirements stated above are not met in this case. As stated above, the offenses charged in Chouteau County could not have been charged in Jefferson County; and the offense charged in Jefferson County could not have been charged in Chouteau County.

Also, the prosecution in Chouteau County is not based on an offense arising out of the same transaction (as that term is defined in Mont. Code Ann. § 46-1-202(23)) as the transaction in Jefferson County. In this case, the transactions are clearly distinct. The acts of Lewton in Chouteau County, by his own admissions, were with the purpose to assist the undercover warden in his hunting and his possession of a bighorn ram in September 2008. They did not involve the permanent possession of parts of the ram, which was the basis for his actions in Jefferson County. Testimony at both the trial in Jefferson County and the hearing on the Chouteau County motion to dismiss established that there was no discussion of Lewton's purchase of the animal parts until after the animal parts had been taken from Chouteau County and into Jefferson County.

Just as a person can be charged with theft of property he knows to be stolen by another person, Lewton was charged in Jefferson County with purchasing an unlawfully-killed game animal. But because Lewton knew of the illegalities associated with the killing of the ram (because of his part in the hunt), the evidence of the unlawful killing of the ram was relevant to his knowledge of the unlawful status of the animal parts.

As noted by the Chouteau County district court, the same transaction factor is not met when conduct charged in a subsequent prosecution is distinct from conduct charged in the initial prosecution. Tadewaldt, 277 Mont. at 267. Therefore,

Tadewaldt's possession of dangerous drugs, found immediately following his arrest for DUI, did not arise out of the same transaction. (Ex. C at 4-5.)

This case is factually distinguishable from the cases of State v. Sword, 229 Mont. 370, 374, 747 P.2d 206, 208-09 (1987) (Sword's making a false statement on a bear trophy form was "motivated and necessary or at least incidental to the accomplishment of the criminal objective" of the acts that were the basis of his federal charge of possessing, carrying and transporting a bear taken unlawfully) and Cech, ¶ 13 (Cech's acts of stealing a vehicle in Montana and driving it, in one or two days, to Washington sought to accomplish the same criminal objective of a Montana theft charge and a Washington possession charge). In this case, Lewton's acts of hunting and possessing the unlawfully-taken animal in Chouteau County were clearly distinguishable in terms of physical acts, motive, time, and place from his act of purchasing the animal parts in Jefferson County.

In support of his argument, Lewton refers to argument made by the State in the Jefferson County case. On the morning of trial, just before commencement of court and with a jury pool waiting, counsel for the State was handed what the Lewton called motions in limine. One of the motions regarded evidence of other bad acts. The State objected to consideration of the motions based on timeliness; the Jefferson County court "overruled" the objection. (3/17/10 Tr. at 245-46, attached hereto as Ex. E.) Shortly thereafter, when asked by the Jefferson County

court for a response regarding the motion, counsel for the State made the argument found on pages 248 to 260 of the trial transcript. The Jefferson County court's discussion of the issue continues through page 264 of the transcript. (Ex. E.)

In arguing that the State had no intention of violating the rules regarding presentation of other bad acts, the State referred to the legal analysis of whether evidence constitutes evidence of the transaction involved in the charged offense or other bad acts. See State v. Crosley, 2009 MT 126, ¶ 48, 350 Mont. 223, 206 P.3d 932. Lewton made reference to the transaction rule in his motion "in limine," as well. His emphasis now on use of the words "same transaction" by the State as it was trying to quickly respond to an untimely motion is unpersuasive. The argument made in the Jefferson County case (when read as a whole and in context) regarding the distinction between other bad acts and the transaction rule is clearly not the same argument presented by the State to the Chouteau County district court. The argument is irrelevant to any determination regarding subsequent prosecution or double jeopardy, and Lewton's claim that the State "cannot have it both ways" is unfounded. (See Applic. for Writ of Super. Control at 31.)

Similarly, the jury instructions used in the Jefferson County case regarding the elements of the crime do not provide a basis for determining the issue raised by Lewton, as they are a statement of Lewton's position in the case rather than any indication of the exposure caused by the charges. The State maintains that they do

not accurately state the law applicable to either the Jefferson County case or the Chouteau County case. And to rely on the instructions as offered and secured by one party, in light of an acquittal, would allow manipulation of the elements of a crime as a basis for relief, even though there is no evidence that the Jefferson County jury used the jury instruction as a guide to the Defendant's exposure.

The Chouteau County district court properly applied the standards regarding motions to dismiss when it denied the Petitioner's motion to dismiss and engaged in no mistake of law. The decision results in no gross injustice to the Petitioner, who has a remedy of appeal if the Chouteau County case results in a conviction.

CONCLUSION

The application for a writ of supervisory control should be denied.

Respectfully submitted this 9th day of June, 2010.

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By: Barbara C. Harris
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Attorney General's Response to Petition for a Writ of Supervisory Control to be mailed to:

Mr. Jack Morris
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The Honorable David Rice
District Court Judge
315 4th Street
Havre, MT 59501

DATED: 6-9-10 Barbara C. Harris

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this response to writ is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, excluding certificate of service and certificate of compliance.

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EXHIBITS

1. State's Motion for Leave to File Information and Supporting Affidavit, dated 8/24/09 ..... Ex. A
2. Information, dated 8/27/09 ..... Ex. B
3. Order on Motion to Dismiss, dated 6/03/10 ..... Ex. C
4. Jefferson County case Information and State's Motion for Leave to File Information and Supporting Affidavit dated 8/20/09 ..... Ex. D
5. 3/17/10 Transcript pages 244 through 265 ..... Ex. E